No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

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UNITED STEELWORKERS OF AMERICA,

*Petitioner*

v.

UNITED STATES OF AMERICA, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No.

UNITED STEELWORKERS OF AMERICA

*Petitioner*

v.

United States of America, Acme Steel Company, Acme-Newport Steel Company, Allegheny-Ludlum Steel Corporation, Wallingford Steel Co., Armco Steel Corporation, Armco Drainage and Metal Products, Inc., National Supply Company, Southwest Steel Products, The Babcock & Wilcox Co., Bethlehem Steel Company, Bethlehem Cornwall Corporation, The Dundalk Company, Buffalo Tank Corporation, Bethlehem Limestone Company, Bethlehem Transportation Corporation, Colorado Fuel and Iron Company, Crucible Steel Company of America, Donner-Hanna Coke Corporation, Great Lakes Steel Corporation, The Hanna Furnace Corporation, Stran-Steel Corporation, National Steel Products Corporation, Inland Steel Company, Interlake Iron Corporation, Jones & Laughlin Steel Corporation, Union Dock Company, Lukens Steel, McLouth Steel Corporation, Moltrup Steel Products Co., Northwestern Steel & Wire Co., Pittsburgh Steel Company, Pittsburgh Tube Co., H. K. Porter Co., Inc., Republic Steel Corporation, Air Vue Products Co., John A. Roebling's Sons Corporation, Sharon Steel Corporation, Shenango Furnace Company, Superior Drawn Steel Company, United States Steel Corporation, Columbia Iron Mining Company, Wheeling Steel Corporation, The Youngstown Sheet and Tube Company, Judson Steel Corporation, H. H. Robertson Company, Joseph T. Ryerson and Son, Inc., Valley Mould and Iron Corporation Wyckoff Steel Company, Ashtabula and Buffalo Dock Company, Boland and Cornelius, International Harvester Company, Cleveland Cliffs Iron Company, Mesabi Cliffs Mining Company, Humboldt Mining Company, Negaunee Mine Company, Marquette Iron Mining Company, Coons Pacific Company, Lerch Brothers, Inc., M. A. Hanna Company,

**Hanna Iron Ore Division of National Steel Corporation, Hanna Ore Mining Company, Hanna Mining Company, Morton Ore Company, Butler Brothers, Douglas Mining Company, Ozark Ore Company, Montreal Mining Company, W. S. Moore Company, North Range Mining Company, Pickands Mather and Company, The Balkan Mining Company, Bennett Mining Company, Crete Mining Company, Cuyuna Ore Company, Erie Mining Company, Hoyt Mining Company, Lake Mining Company, Mahoning Ore & Steel Company, Odanah Iron Company, Puritan Mining Company, The Verona Mining Company, The Youngstown Mines Corporation, Western Mining Company, The Sunday Lake Iron Company, The Mesabe Mining Company, Pioneer Mining Company, Pittsburgh Pacific Company, Reserve Mining Company, St. James Mining Company, Skubic Brothers Company, Susquehanna Ore Company, Zenith Mining Company, Snyder Mining Company, Oglebay Norton Company**

*Respondents*

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on October 27, 1959.

## OPINIONS BELOW

The District Court for the Western District of Pennsylvania issued only findings of fact and conclusions of law, which appear in the Record at pp. 244-48. The opinion of the Court of Appeals, which appears in the Record at pp. 286-310, is not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1959. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. §1254(1) and

Section 208(c) of the Labor Management Relations Act, 29 U.S.C. §178(c).

## QUESTIONS PRESENTED

1. Whether, within the meaning of Section 208(a)(ii), Title II, Labor Management Relations Act, 1947, detriment to economic well-being is comprehended within the statutory term "national health or safety."

2. Whether, within the meaning of Section 208(a), Title II, Labor Management Relations Act, 1947, peril to the "national . . . safety" which emanates from a shutdown of an insubstantial part of an industry suffices to confer jurisdiction upon the District Court to enjoin a strike of the entire industry.

3. (a) Whether the courts below applied the proper standard of proof for a finding that continuance of the steel strike will imperil the national health and safety.

(b) Whether, on any standards, the findings of the courts below can be sustained.

4. (a) Whether under the terms of Section 208(a), Title II, Labor Management Relations Act, 1947, the District Court has equitable discretion to determine whether to grant or deny an injunction;

(b) Whether the Court of Appeals can sustain the issuance of the injunction as an allowable exercise of discretion when the District Court exercised no discretion;

(c) Whether, assuming that the District Court did exercise its discretion, its action in enjoining this strike constituted an abuse of that discretion.

5. Whether the functions conferred upon the District Court by Section 208(a), Title II, Labor Management Relations Act, 1947, call for the exercise of nonjudicial powers in contravention of Article III, Section 2, of the United States Constitution or the doctrine of separation of powers.

## STATUTE INVOLVED

Sections 206-210 of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 176-180, 61 Stat. 155, provide, in part, as follows:

SEC. 206. Whenever in the opinion of the President of the United

States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

* * * *

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to

imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

## STATEMENT OF THE CASE

The petitioner, United Steelworkers of America, one of the defendants below, is a labor organization which is the certified or recognized collective bargaining representative of some or all of the nonsupervisory employees of each of the other named defendants in this case. These defendants are employers who operate mines, plants, ships, and other facilities relating to the production and fabrication of steel, and represent a substantial part

but not all—of an industry engaged in commerce, and the production of goods for commerce, among the several states and with foreign nations.

Prior to June 30, 1959, there were in effect between the Union and the employer defendants as well as almost all other employers in the industry—collective bargaining agreements prescribing wages, hours, and other terms and conditions of employment, which agreements, by their terms, were to expire on June 30. (R. 12)

Early in May, negotiations for new agreements began between the representatives of the Union and representatives of twelve of the largest employers. It is traditional in the steel industry for the smaller employers to follow the "pattern" established by collective bargaining between the Union and the industry leaders. (R. 12)

As the June 30th deadline approached, there was no prospect of an immediate agreement, and the parties, at the request of the President of the United States, agreed to extend the old agreement for two weeks. (R. 12) At the end of that period there was still no settlement, and a strike began. Negotiations, with only short interruptions, have continued during the strike, and even during the course of this litigation.

A summary of the negotiations up to October 19 and the issues in dispute between the parties appears in the Report to the President of the Board of Inquiry, at pp. 11-33 of the record, and in the statement of President David J. McDonald to that Board, which is attached to Mr. McDonald's affidavit in this case and is part of the record herein. (R. 42-51)

In the opinion of Mr. McDonald, which appears in his sworn affidavit and which is uncontradicted in the record, the industry has steadfastly refused to settle the dispute on any reasonable terms because it anticipated the use by the Government of the Taft-Hartley emergency procedures to break the strike. (R. 40-41)

On October 9, 1959, the President of the United States took the first step under the Taft-Hartley emergency procedures. He issued Executive Order 10843 (R. 9), appointing a Board of Inquiry, pursuant to Section 206 of the Labor Management Relations Act. In this order, the President expressed the "opinion"—which, under the statute, he must do before acting under the

emergency provisions that the strike, if permitted to continue, would imperil the national health and safety. On October 14, the President, in Executive Order 10848 (R. 11), extended to October 19 the date upon which the Board was to report to him.

The Board submitted its report (R. 11-33) on the date it was due. This report, in accordance with the statute, dealt only with the collective bargaining issues in dispute between the parties. It made no finding or recommendation concerning the presence or absence of a threat to the national health or safety.

On receiving the report, the President directed the Attorney General to petition any district court having jurisdiction of the parties to enjoin the continuance of the strike and to order such other relief as might be necessary or appropriate. (R. 8)

On October 20 the present action was filed in the United States District Court for the Western District of Pennsylvania. (R. 1) By stipulation, all defendants waived service of process and submitted to the jurisdiction of the Court. They also stipulated that the case be determined on the basis of affidavits rather than oral testimony, and that it be submitted to the court upon final hearing. (R. 34)

At the trial, the following basic facts were found or undisputed. The strike had shut down approximately 85 percent of the steel producing capacity of the United States. (R. 244) The remaining 15 percent was still operating, either under extension agreements between the Union and the employers involved, or, in a few instances, because the employees involved are not organized or are represented by some other union (R. 98-102). Subsequent to the trial of this case, one of the struck companies who was a defendant below, Kaiser Steel Corporation, signed an agreement with the Union, settling the strike at that company. Consequently, an additional 2 percent of the steel industry is now operating, and 83 percent is presently affected by the strike. By stipulation, the proceedings as to Kaiser Steel Corporation have been ordered to be dismissed. (R. 322)

Steel production prior to the strike was abnormally high in anticipation of the strike, and for the first nine months of 1959 total production was approximately 72.4 million ingot tons, as compared with a total of 85.2 million tons for the entire year 1958. (R. 103)

A large part of the Government's case was based on the allegation that the strike was affecting the economic well-being of the nation. The evidence with respect to this issue showed that as of the time of the hearing, unemployment attributable to the strike was 265,000, not counting strikers, (R. 246) and that total unemployment was slightly in excess of 3 million (R. 108). It was found by the district court that if the strike were to continue through the balance of 1959—another 2½ months—strike-caused unemployment (apparently including strikers) would reach 3 million. (R. 246) Thus, assuming that finding to be correct, unemployment would be increased by approximately 2¼ million if the strike were to continue through December. In 1958, without any major strike, unemployment reached a peak of 5.4 million. (R. 108) There is no finding, and no evidence on the record which would support a finding, that the strike would last through December if the injunction were denied. But even if the strike should last that long, the findings indicate that the economy would not be affected as seriously as it was affected by the 1958 recession.

A considerable amount of evidence was presented concerning the effect of the strike on the national defense program. It was undisputed, however, that the total amount of steel consumed for defense purposes during the 18 months prior to the strike was never more than 1.2 percent of total production—which, in terms of tonnage, is approximately 5 percent of the capacity still in operation despite the strike. (R. 91) The court found that despite the fact that steel was still being produced at a rate many times as great as the rate at which the defense program consumes steel, certain steel products needed in connection with some aspects of the defense program were nevertheless presently unavailable because of the steel strike. (R. 246-47) The Union contended below and will contend in this Court that this finding was not supported by the evidence, but even if the finding be accepted as true, it means only that a very tiny fraction of the plants now on strike are necessary for the defense program.

On these facts, the District Court made the conclusory finding that the strike imperiled the national health and safety, (R. 247) and issued an injunction. (R. 249-50) The court rejected the union's argument that the statute is unconstitutional because it authorizes the court to issue an injunction which does not enforce

a pre-existing legal obligation, but merely creates such an obligation. The court did not pass on the Union's further argument that it should, in the exercise of its equitable discretion, refuse to issue an injunction in this case.

The union promptly filed an appeal (R. 251) and moved the district court for a brief stay to enable the Union to apply to Judge Staley of the Court of Appeals for the Third Circuit for a stay pending appeal. This was granted. (R. 253) Shortly thereafter, Judge Staley, on motion by the Union, granted a stay until 10 A.M. the following morning, or, if the union had by that time filed a motion before the Circuit Court, until further order of the Court. (R. 266)

On October 22, at 10 A.M., the parties appeared before the Third Circuit Court of Appeals in Philadelphia, on the Union's application for a further stay (R. 267) and application for advancement of consideration of the appeal (R. 278). Chief Judge Biggs, and Judges Goodrich and Hastie comprised the court. At the suggestion of the court and with the agreement of the parties the appeal was heard on the merits at that time. The court continued the stay in effect, except as to paragraph 5 of the injunction, which directs the parties to bargain collectively and to attempt to settle their differences. (R. 282)

On October 27, the Court of Appeals issued a decision affirming the judgment of the district court, Judge Hastie dissenting. At the same time it issued a *per curiam* opinion (R. 318) which set forth the views of the other members of the court with respect to rehearing. Judges McLaughlin and Staley voted for rehearing. Judge Forman voted against. Judge Kalodner disqualified himself. The result was an equally divided court and no rehearing. On its own motion, the court continued the stay in effect until November 2, to permit aggrieved parties to petition for certiorari. (R. 318)

The opinion of the Court of Appeals began with a consideration of the constitutionality of the statute. Referring to the statement of purposes in section 1(b) of the Labor Management Relations Act, 29 U.S.C. § 141(b), the court concluded that one of the purposes of the act was "to bring an end to industrial strife which affects commerce to such a degree as to menace the general welfare." (R. 292) Thus, the court said, it is "tortious" to permit "a labor dispute to continue to the point where national health

or safety is imperiled." (R. 292) The national emergency injunction, the court reasoned, is simply the method provided by the statute for remedying the "tort."

The court apparently relied as well on a somewhat different theory to sustain the constitutionality of these provisions. These sections, the court held, have to a limited extent revived the old "labor injunction" which the Norris-LaGuardia Act had destroyed. While the court considered such an injunction, compelling employees to return to work, a form of "status judgment," it held that the entry of such a judgment is within the constitutional power of an Article III court, just as the review of administrative decisions is part of the judicial power. (R. 295)

Finally, the court held that the determination which the statute requires a court to make before issuing an injunction is "specific enough and factual enough to bring the inquiry within the area of judicial decision as distinguished from legislative judgment." (R. 296)

The court then turned to the findings of fact made by the district court. It rejected the Union's argument that to justify the injunction the peril to the national health and safety must be present or imminent, stating that "the words of the Section speak to the future, *viz.*: 'If [the strike is] permitted * * * to continue [it] will imperil the national health or safety.'" (R. 300)

Relying on the affidavit of Dr. Raymond Saulnier, the court concluded that the effect of the strike on the defense program could not be remedied by opening a few plants, because the "steel industry is too vast and too complicated to be segmented so as to make such a desirable result practicable." (R. 300)

The court concluded that the affidavits submitted by the Government adequately supported the findings of the court below. Since the Government's witnesses were all cabinet officers or department heads, the court held that they were qualified to testify as experts and that their testimony was entitled to be weighed "in a different light from that of a witness who testifies that a motor car was or was not on a portion of the highway where it did not lawfully belong." (R. 301)

The difference between the affidavits submitted by the Union and those introduced by the Government, said the court, was largely a difference as to "avenues of approach. We find no variances in

the affidavits basically material to the findings made by the court below or to the issues with which we are immediately concerned." (R. 306)

Finally, the majority opinion considered the Union's argument that the injunction should have been refused in the exercise of equitable discretion, in order to facilitate a prompt settlement of the labor dispute in the public interest. The court conceded that a court of equity "of necessity must weigh" the fact that less drastic remedies were available to the Government, but held that "the danger is great enough and calls for a remedy as sweeping as the law will permit." (R. 308) Further, the court stated that one of the purposes of the emergency procedures is to set in motion certain administrative machinery—the Board of Inquiry, the last-offer ballot, etc.—designed to help settle the dispute, and that this machinery would not be available without the injunction. The court seemed to say that it would have affirmed a decision withholding the injunction as a matter of discretion, but that "we cannot say that in issuing the injunction the trial court abused its sound legal discretion." (R. 310)

Judge Hastie dissented. In his view, the primary purpose of the Taft-Hartley injunction "is not to force strikers to return to work but to facilitate a settlement of a serious industry-wide strike by collective bargaining," (R. 310-11) and that in this case, at least, the injunction would make a settlement more difficult. He therefore concluded that the district court should have denied the injunction as a matter of sound discretion.

In Judge Hastie's opinion, the Government had other adequate statutory powers to assure the continued production of goods needed for defense, with or without a strike, and that "it is reasonable to believe that some different purpose motivated the Congress in authorizing temporary injunctions under the Taft-Hartley law." (R. 312)

Neither the Government nor the industry had "shed any light on this critical question" of whether an injunction would help or hinder a settlement, said Judge Hastie. "There is no suggestion that any tension or hostility would be relieved or any impediment to settlement removed by a suspension of the strike." (R. 313-14) The only evidence is the affidavit of David J. McDonald, and the attached public statements of George W. Taylor, Nathan P. Fein-

singer, and W. Willard Wirtz, all of which tended to prove that a settlement could be negotiated if the injunction were denied.

Judge Hastie disagreed with the majority's view that an injunction against the strike was necessary to put the administrative machinery contemplated by the emergency provisions into operation. He interpreted the statute as permitting the court to order the parties to follow the procedures provided in the statute without at the same time terminating the strike. He pointed out that the court had, in effect, done so when it permitted paragraph 5 of the injunction to take effect while staying the other parts of the order. "This much and no more," he concluded, is "an appropriate exercise of equitable judgment and discretion in the circumstances of this case." (R. 317).

## REASONS FOR GRANTING THE WRIT

1. This case presents important questions of federal law which have not been, but should be, decided by this Court. The provision of Sections 206-210 of Title II of the Labor Management Relations Act, 1947, provide an extraordinary remedy which has been administered without guidance from this Court for 12 years. The scope of the District Courts' powers and discretion under the Act, the nature of the proof required to support the finding as to peril to the national health or safety which the District Court is required to make, the kinds of disputes which the Act may properly be said to cover, and the constitutional validity of the entire scheme are questions of utmost gravity. They are potentially present in every case in which those sections are involved. This Court, for that reason alone, should grant certiorari here so that all concerned—unions, employers and the Government—may be able to rely upon an authoritative interpretation of the statute.

2. For reasons to be more fully set forth below we believe that this case presents these issues in particularly critical form. The public importance of the steel strike requires no elaboration. The merits of the underlying dispute are, of course, not of judicial concern. But governmental intercession in the dispute, unauthorized by the statute, unsupported by proper proof and presented without proper regard for the discretionary powers of the District Court is a matter of the utmost judicial concern. And the invocation of a remedy which is of doubtful constitutionality in a dispute

of this magnitude requires, we believe, authoritative disposition by this Court.

3. Acquisition of jurisdiction by the District Court in this case was based upon two determinations made by it: (a) "national health" will be imperiled because the steel strike will idle workers and facilities dependent upon steel (R. 245-246, 247); (b) "national safety" will be imperiled because the shortage of certain steels affects the progress of certain defense activities (R. 246-247). Each determination raises serious questions as to the proper reach and interpretation of the statute. We deal first with "health."

The District Court here concluded that "The national health will be imperiled if the strike is permitted to continue" (R. 247). This conclusion rests exclusively upon its subsidiary prediction that (*ibid.*):

> A continuation of the strike will have the ultimate effect of adversely affecting millions of small business enterprises, almost all of which are directly or indirectly dependent upon steel products and most of which lack the resources to stock large inventories. In addition, it will have the effect of idling millions of workers and a large proportion of the facilities in industries dependent upon steel for their continued operation. Manufacturing industries directly dependent on steel mill products account for the employment of approximately 6,000,000 workers and normal annual wages and salaries totalling approximately $34,000,000,000. The products of these industries are valued at over $125,000,000,000. The national health will be imperiled if the strike is permitted to continue.

This conclusion is obviously unrelated to "health" in the conventional sense of food shortages, impairment of hospital or medical care, lack of heating and sanitation, or the like. Nor is there anything in the record which bears at all on physical health. And it is singularly revealing that there is no affidavit from the Secretary of Health, Education and Welfare.

The conception of health embraced by the District Court, and undisturbed by the Court of Appeals, is rooted instead in the view that the statutory term "health" embraces economic well-being.

This is explicit in the opinion expressed by the President and in the affidavits of his subordinates. In convening a Board of Inquiry the President stated that "if production is not quickly resumed, severe effects upon the economy will endanger the *economic* health of the nation" (R. 10, emphasis supplied). The Secretary of Labor expressed his opinion that the "*economic* health of the nation is being endangered" (R. 173, emphasis supplied), and the Administrator of the Small Business Administration was similarly of the view that "the strike will seriously endanger the *economic* health of the nation . . ." (R. 184, emphasis supplied).

To expand the concept of "health" from physical to economic well-being departs from the ordinary meaning of the word. And it is demonstrable that Congress used the word in its conventional sense.

The Senate bill, as reported and passed, was confined to peril to the "national health or safety."[1] The House bill, as reported and passed, extended to peril to "the public health, safety, *or interest*." The Senate version prevailed in conference.[3] The rejection of the view that the statute should extend to national "interest" is emphasized by the colloquy on the floor of the House between Congressmen Kennedy and Owens (93 Cong. Rec. 3513, in 1 Leg. Hist. 669):

> "MR. KENNEDY. I believe that this country should certainly be in a position to combat a strike that affects the health and safety of the people. Therefore, I feel that the President must have the power to step in and stop those strikes. I am not in the position of opposing everything in this bill, but there are certain things in the bill that are wrong. I do not see how the President is going to have the power to stop strikes that will affect the health and safety of the people under the procedure listed in section 203. I think he must have that power.

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[1] 1 *Leg. Hist.* 146, 148, 274, 276. "Leg. Hist." refers to the two-volume edition of the *Legislative History of the Labor-Management Relations Act, 1947* (Govt. Print. Off., 1948).

[2] 1 *Leg Hist.* 87, 88, 214, 215 (emphasis supplied).

[3] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 64, in 1 *Leg. Hist.* 568.

"I agree with you that any bill providing for an injunction should carefully consider the position of the striking union and make sure that their rights are protected. I think that in those cases Federal seizure until the dispute is settled would perhaps equalize the burden in the fairest possible manner.

"MR. OWENS. Will not the gentleman admit that we have a third word in there? It is 'interest.' Could we not better use the word 'welfare' instead of 'interest,' because the word 'welfare' occurs in the Constitution? It is just as broad as the word 'interest' and more practical.

"MR. KENNEDY. The proposal embraces two separate things, health and safety. Because the remedy is drastic these two, in my opinion, are sufficient. I believe we should apply this remedy when the strike affects health or safety, but not the welfare and interest, which may mean anything. I would not interfere in an automobile strike, because while perhaps that affects national interest, it does not affect health and safety.

"MR. OWENS. Does not the gentleman agree that 'welfare' is the stronger and in line with the President's idea?

"MR. KENNEDY. No. Both 'welfare' and 'interest' are too indefinite. They could cover anything. I would not have the law apply except in cases where the strike affected health and safety."

To expand the scope of the statute to include economic well-being is thus to interpolate into it the rejected word "interest." This is an entirely new conception. As the Government stated on argument below, "in all of the fourteen prior cases under Taft-Hartley, the Government proceeded on the single-barrel basis of the effects upon critical items needed for defense. In this case we are proceeding also on the other basis, the effect on the national economy, as well" Transcript of oral argument in the Court of Appeals, p. 104.

4. The second determination made by the District Court related to the national safety. We do not, of course, contest the proposition that defense needs are pertinent to a determination of peril to national safety. This case, however, presents a serious question as to whether a peril to national safety, assuming for the moment that one was properly proved to exist here (see par. 5 below), which arises from a shutdown of a tiny fraction of an industry suffices to confer jurisdiction upon a District Court to enjoin a strike in the

entire industry; whether, in other words, a danger created by a strike of 5,000 employees empowers a District Court to require 500,000 to return to work.

It is uncontroverted in the record that 63 steel mills throughout the country are still in operation, unaffected by the strike, and account for 15.36 percent of the total steelmaking capacity in the United States (R. 99-102). To this should be added the two percent steelmaking capacity of the plant of the Kaiser Steel Corporation which has been reactivated as a result of the settlement reached between the Union and the Company. It is also uncontroverted that steel requirements for all defense purposes constitute a minute fraction of steel produced. Thus, in no quarter since 1958 have mill shipments for defense purposes exceeded 1.2 percent of total mill shipments; for the entire year and a half ending mid-1959, shipments for defense purposes accounted for less than one percent of total shipments (R. 91). This quantity is less than five percent of the productive capacity of the steel mills currently in operation; in the aggregate, the current level of steel output is some twenty times as large as defense requirements. (*ibid.*)

The District Court found that "Certain items of steel required in top priority military missile programs are not made by any mill now operating, nor available from any inventory or from imports" (R. 246). This finding repeats in so many words the unparticularized statement in the affidavit of the Secretary of Commerce (R. 162). Neither that affidavit, nor any other, specifies the type or quantity of such steel, the closed plants at which they are produced, or the number of such plants which would have to be reactivated to fill the need. Industry and governmental sources, of which this Court may take judicial notice, show that virtually every type of specialty steel necessary for defense purposes is or can be produced by nonstruck mills, and that the nonstruck mills, although accounting for 15.36 percent of total steelmaking capacity, actually account for 35.04 percent of electric steel furnace capacity. Almost all high quality alloy steels — which are the special steels required for defense purposes — can be made in electrical steel furnaces now operating. In the case of the highly vital vacuum melted steels (see R. 196), 20 of 23 companies utilizing this process are not on strike.[4]

[4] The supporting data will be included in the brief on the merits if certiorari is granted.

But even if specialty steel requirements for defense cannot be fully met from nonstruck mill capacity, the unavailable quantity is exceedingly small. The total steel requirements of all kinds for defense purposes do not exceed 1.2 percent (R. 91). Specialized steel requirements must constitute a fraction of that 1.2 percent. And the fraction of that fraction which cannot be supplied by the plants now working must be minute indeed. We cannot know how minute because the Government has not informed the Court, or the parties, what kinds of steel it lacks, how much of it, or what plants make it.

It is this central and indisputable fact which exposes the fundamental statutory misconception upon which the finding of the court below of peril to national safety rests. For, assuming the adequacy of the finding of peril to the national safety, missing is the indispensable companion finding or basis for one that this peril is the consequence of the shutdown of a substantial part of the industry. To acquire jurisdiction to issue an injunction, Section 208(a) requires that the District Court make two findings, namely, that the "threatened or actual strike or lock-out" (1) "affects an entire industry or a substantial part thereof" *and* (2) "if permitted to occur or to continue, will imperil the national health or safety." Unquestionably the steel strike affects a substantial part of the industry. But it is not continuance of the strike in a substantial part of the industry which imperils safety. At most, it is only continuance of it in that handful of mills necessary to produce specialized steel that can be said to do so. By no latitude of interpretation can that handful be described as a "substantial part" of an industry comprised of 310 steel plants on strike (R. 172), and 63 nonstruck steel companies (R. 99-102), themselves operating several hundred hot rolling mills (R. 123). This is not a single dispute but a great number of disputes in which there are some common issues.[5] Unlike the Coal Industry, there are in Steel separate collective bargaining agreements and separate collective bargaining units equal in number at least to the number of employer defendants in this case. Nothing except the companies' insistence prevents individual companies from separately settling their disputes with the Union — as some have done. It is unthinkable, therefore, that where the

[5] For some of the differences, see R. 17, 21, 23.

peril, if there be any, emanates from the disputes at an insignificant number of these companies, the statute empowers the District Court to bring to a standstill the strike in the whole of the industry. Congress did not arm the District Court with an elephant gun to bring down a gnat.

The Court of Appeals does not meet this argument directly but makes certain statements which are relevant to it. It relied upon the affidavit of Dr. Raymond J. Saulnier, Chairman of the Council of Economic Advisers, to support the view that "a selective reopening of a small number of mills to meet national defense needs" is not practicable (R. 300-302).

Dr. Saulnier makes three points. First, he quotes from the Business and Defense Services Administration that "to satisfy defense requirements" "it would be necessary to reactivate 25 to 30 hot rolling mills together with supporting" facilities, and this "would be totally impracticable" (R. 196). However, a single integrated plant can and often does comprise 25 to 30 hot rolling mills and supporting facilities. This is essentially the situation with respect to the reactivated Kaiser plant, and there was nothing impractical about reopening it.

The only impracticality identified by the Business and Defense Services Administration is that it would not be feasible to reopen the plant "to meet only defense requirements . . ." (R. 196). But there is nothing to say that the plant could not be opened for all purposes—civilian and defense production. Surely it is not less practical to reopen one plant for all purposes rather than to reopen all 310 plants for all purposes, when the sole justification for reopening any struck plant is a minute amount of specialty steel needed for defense purposes. The statement of Robert R. Nathan in his affidavit stands quite unrefuted that specialty steel for defense "could certainly be produced in a very small number of mills which might be re-opened to assure the availability of such special items" (R. 92).

The second point that Dr. Saulnier makes, relied upon by the Court of Appeals (R. 301), is that "Obtaining adequate supplies of . . . essential civilian items of steel, like obtaining steel for defense purposes, would clearly require the opening of more than just a few mills" (R. 197). But the record does not establish any shortage of "Essential civilian items of steel." Quite to the contrary (R. 69-91). This consideration is therefore irrelevant.

The last point made by Dr. Saulnier, relied upon by the Court of Appeals (R. 300-301), is that "Even if it were technically possible to resume steel production on this selective basis, to do so would be exceedingly uneconomic and wasteful," and "would be offensive to the public conscience, as well as to the public interest" (R. 197). We have shown that there is nothing uneconomic or wasteful in reopening one or a few plants for all purposes, and nothing which precludes it. This aside, what is truly "offensive to the public conscience, as well as to the public interest," is to force over 500,000 workers to return to work against their will, and to set at nought the immense sacrifices they underwent in exercising their right to strike. Especially is this so when all that is in the balance on the other side is presumed waste and inefficiency.

It is thus clear that any peril or defense (if peril there be) arises from a shortage of certain specialty steels (if shortages there be) producible in a handful of struck mills (if indeed it cannot all be acquired from mills now in operation). All danger to defense arises at best from a shutdown of a few mills and can be averted by reopening these mills. This situation fails to meet the statutory test for vesting the District Court with jurisdiction, namely, that a shutdown of a *substantial* part of an industry imperils safety. The District Court acquires no jurisdiction to enjoin a strike in the whole of an industry because of danger which emanates from the shutdown of an insubstantial part of it.

5. All of the determinations made by the District Court with reference to health and safety rest, to a greater or lesser degree, upon evidence which is conclusory in nature and unsupported by a sufficient particularization of subsidiary data necessary to justify or even evaluate the conclusion. Whether a District Court should be permitted to take the drastic action of terminating a strike of 500,000 employees upon evidence of this nature constitutes a serious and important question. This is particularly true where, as here, the case is heard upon final hearing and the Government undertakes to prove by a preponderance of the evidence that the statutory requirements are met.

We do not urge that opinion evidence is inadmissable in this kind of a proceeding. But "opinion evidence, to be of any value, should be based upon admitted facts or upon facts within the knowledge of the witness, disclosed in the record. Opinion evidence that does

not appear to be based upon disclosed facts is of little or no value." *Balaban & Katz Corp.* v. *Commissioner of Internal Revenue*, 30 F. 2d 807, 808 (C.A. 7).

We will not, in this petition, although we will do so if certiorari is granted, examine in detail the findings of the District Court and the evidence upon which they were based. It is sufficient to state here that the evidence was of three general kinds. The first was simply the statement by a Government official that the steel strike has created a peril to national health or safety (R. 167, 171, 173, 184, 188). Obviously such a bald conclusion, without more, is plainly insufficient. The second kind of evidence was a statement by a Government official that the steel strike or a delay in the resumption of steel production would result in damage to the national defense, or the missile program, etc. (R. 161-167.) This constitutes a slight advance, but not much. Neither the court nor the parties are placed in any position to evaluate the nature or extent of the damage, or the remedy necessary to correct or prevent it, let alone to judge whether the opinion is soundly based. Finally, in two affidavits only, reference is made to a particular kind of project which has been affected by the steel strike. Those two are the affidavits of the Acting Secretary of Defense (R. 168) and of the Deputy Administrator of the National Aeronautics and Space Administration (R. 174). But, even here, there are no particulars as to the nature of the steel which cannot be obtained, the reasons why it cannot be obtained from mills now operating, or indeed as to what relation the unspecified part of the project, which is affected by a shortage of an unspecified kind of steel, has to the military weapon itself. And there is no specification, finally, of the relationship of the delay claimed to result from the strike to the entire construction schedule.

There is not, in this entire record, one piece of straightforward and precise evidence which says "Steel of Type XYZ (or plates so many inches wide, etc.) is necessary for the production of a named missile (or a submarine, etc.) and is not available because of the steel strike."

Without going into the detail which shows quite graphically the failure of the Government to prove in any acceptable manner the existence of a peril to the national safety resulting from the steel strike we think that it is quite clear that a serious question is pre-

sented here as to the kind and quality of proof which should be required by a District Court before it takes the drastic step of enjoining a strike affecting the lives and welfare of 500,000 workers.

This question is accentuated in this case by the uncontroverted fact that the Government itself has not regarded the needs of national defense to be sufficiently serious to invoke the powers which it has to assure itself of an adequate supply of steel for defense purposes from existing inventory and from productive capacity of nonstruck mills. The Defense Production Act of 1950 empowers the President or his delegate to establish priorities and allocate materials needed for defense.[9] The Government through the Business and Defense Services Administration, its agency for this purpose, has not yet utilized its full power under this statute. On July 20 and 28, within two weeks after the beginning of the strike, the BDSA simply announced through two releases that it had taken certain steps to keep itself informed of the steel situation, that it had formally reminded the nonstruck companies of their responsibilities under the law, and that additional steps would be considered if the strike continued (R. 108, 109-110). The BDSA did nothing further until October 16, one week after the President convened the Board of

[9] Section 101 (a) and (b) of that Act, 50 U.S.C. App. §2071, provide that:

"(a) The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

"(b) The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.

Inquiry. On that date the BDSA issued an order accelerating the delivery of steel for defense purposes by struck companies upon resumption of operations and by nonstruck companies immediately (R. 166; BDSA Order M-1A). To this date, however, the BDSA has not "frozen" any type of steel, either in inventory or to be produced by nonstruck mills, by requiring that it be devoted exclusively to defense needs. In contrast, in the 1956 steel strike, the BDSA on July 20, 1956, on the twentieth day of the strike, issued an order prohibiting shipments against unrated (nonessential) orders of all types of aircraft-quality steel, nickel-bearing steel plate over 72 inches wide, or nickel-bearing stainless steel plate over ½ inch thick. 21 Fed. Reg. 5484 (July 21, 1956). The failure of the Government to yet use its full power in the current situation is eloquent testimony of the lack of any genuine shortage of steel to meet defense needs.

6. The question of whether a District Court, whose jurisdiction is invoked under Section 208 of the Act, has discretion as to whether it shall issue an injunction if the statutory jurisdictional prerequisites are met has never been authoritatively determined. In this case the union urged strongly upon the District Court, both orally (R. 131) and in its memorandum, that the court had discretionary powers and that it should exercise them in favor of refusing the injunction order requested by the Government. The Government, in its brief to the District Court, simply ignored the question and assumed that if the statutory requirements were met an injunction against the strike should issue as a matter of course.[10] There was no further briefing in the Court of Appeals. In the oral argument there the union again urged that the District Court had discretion. Counsel for the Government first argued that an injunction against the strike was mandatory and, then under questioning by the Court, agreed that the Government's position might be said to be that the discretion which is ordinarily present "was squeezed out, so to speak." (Transcript of Argument, pp. 94-97.)

We think it plain that the statute should be read as vesting discretion in the District Court, not only to determine whether an injunction should issue but also to determine whether the injunction

[10] Both the union's memorandum and the government's brief are in the original record which has been forwarded to this court by the Court of Appeals for the Third Circuit. They were, however, omitted from the printed record by stipulation of counsel.

should run against the whole strike, and all of the strikers, or against just that small percentage of the struck mills which alone create the peril to health or safety. Our views on this question are confirmed by the statutory language, which does not direct the Court to issue an injunction but only grants jurisdiction to the Court to do so, and which specifically gives the Court power "to make such other orders as may be appropriate." See *Hecht* v. *Boules*, 321 U. S. 321, 329-330.

We believe further that the District Court plainly erred in not exercising its discretion. That it did not do so is clear from the record. The transcript of the proceedings before the District Court on October 21 (R. 220-244) is devoid of the slightest suggestion that the court recognized that it had any discretion in the premises. In his brief oral statement (R. 239) the District Judge stated simply that he would sign findings of fact and conclusions of law meeting the statutory requirements and that he would therefore issue an injunction. The court overruled the proposed conclusion of law submitted by the union that the court had discretion (R. 215). The findings and conclusions adopted by the court contained no reference to any equitable considerations other than the absence of an adequate remedy at law and simply concluded that the Government was entitled to the relief prayed for because of the findings as to safety and health. The injunction order itself is totally silent on the reasons for its issuance. Plainly, therefore, and in the light of the requirement of Rule 65 (d) that the reasons for granting an injunction be set forth by the court issuing it, it must be concluded that the District Court simply assumed that the injunctive remedy was mandatory.

All the members of the Court of Appeals agreed that the District Court, under the statute, had discretionary powers, although they disagreed as to the consequences of their agreement.

This raises a further question. Chief Judge Biggs, for the majority, concluded that "we cannot say that in issuing an injunction the trial court abused its sound legal discretion." (R. 310). Judge Hastie, to the contrary, based his dissent, at least in part, on the view that the District Court's action was impermissible as a matter of equity. Passing, for the moment, the question on which they disagreed, there is a serious question, we believe, as to whether an injunction

entered without consideration of relevant equitable considerations can be sustained on appeal.

It simply cannot be said, as Chief Judge Biggs did, that the court below might properly have decided either way "in the exercise of its sound legal discretion" (R. 310) and that, therefore, there was no reversible abuse of discretion. For the court below exercised no discretion.

For reasons which we summarize briefly below there were presented to the District Court several alternative courses of action. The choice as to these alternatives was properly to be made by the District Court, not only on the bare face of the record before it but also by examination and discussion with the parties and their counsel. The failure of the District Court even to inquire into the matters properly bearing on the exercise of his discretion is emphasized by the statement of counsel for the union to the court that it was the policy of the Union to cooperate with the Government in obtaining any steel necessary for national defense, and the proof on that issue submitted by the union. (R. 150-151)

If we assume that the Court of Appeals properly could reach the equitable questions involved herein despite the failure of the trial court to consider them, we believe that a serious question is presented as to whether that court was correct in its conclusion that a proper balancing of the equities here would support the action taken by the trial court. In addition to the reasons set forth by Judge Hastie in dissent, which we rely upon, we rely also on several additional considerations.

First, of course, is the presence of the additional and untried remedies available to the government to meet any peril to the safety or health of the nation which may be caused by the strike. They are set forth in Chief Judge Biggs' opinion. (R. 307-308) We think it was plain error not to consider the availability of these remedies in determining whether, as a matter of sound legal discretion, an injunction should have been issued here.

The second point we urge is that, if an injunction should be issued, that injunction should be limited to the selective reopening of a few plants which would meet any conceivable defense needs for steel. The view of the Court of Appeals that this was impractical was clearly erroneous, as we have shown above. The error of the courts below is emphasized by the evidence in the record and

the representations made to the District Court and, in quite specific terms to the Court of Appeals, by counsel that the union had never turned down any request made by the government to provide needed material for defense.[11] A discriminating exercise of judicial power here would have met any conceivable peril to the national defense, and, at the same time, would have preserved the values which Congress plainly wanted to preserve by limiting its interference with free collective bargaining to the minimum extent made necessary by the overriding requirements of national safety or health.

Finally, the majority below, in their consideration of the equities, seemed to have been mainly influenced by the view that only if an injunction were issued could the administrative machinery provided in Section 209 be employed. But, as Judge Hastie pointed out, an injunction against the strike as such is not necessary to activate these procedures (R. 316-317). An injunction in the terms of paragraph 5 of the order entered by the District Court (R. 250) would suffice. Even if an injunction against a strike is necessary, one requiring selective reopening of the plants would clearly constitute an adequate statutory trigger. There was, therefore, even on the reasoning of the majority of the court below, no equitable basis for issuing an injunction against 500,000 strikers.

7. The function of the courts established by Article III of the Constitution is "the judicial function of adjudicating justiciable controversies." *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 600. "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." Mr. Justice Holmes in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227. "By cases and controversies are intended the claims of litigants brought before the courts . . . for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs." *Muskrat* v. *United States*, 219 U. S. 346, 357.

The functions vested in the District Court by Sections 208 and 210 of the Act are outside these bounds of judicial power. The District Court does not enforce a pre-existing duty, for there is no duty until the court declares it, and Congress intended to create none. It

[11] Transcript of Oral Argument before the Court of Appeals, page 24.

is the act of the District Court in issuing the injunction which Congress intended should both create and enforce the obligation to cease striking for eighty days. There is no standard of conduct to which a union can conform to avoid an injunction.

Voluntary cessation or deferment of a strike for eighty days or longer avails nothing. And necessarily so under the scheme of the statute. For the court order is the premise for the exercise of administrative functions. The parties are, upon its issuance, obligated to bargain "with the assistance of the [Federal Mediation and Conciliation] Service" (Sec. 209(a)). The Board of Inquiry is reconvened, and if the strike is not settled at the end of sixty days, the Board is required to "report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement of the employer's last offer of settlement." Within the next fifteen days the NLRB conducts a ballot among the employees to ascertain whether they wish to accept the last offer. The results are certified to the Attorney General, who then moves the court to discharge the injunction, "which motion shall then be granted. . . ." The final step is the President's report to Congress with his recommendation for its "consideration and appropriate action."

Thus the District Court issues an injunction which can last, at most, for 80 days, which is based on no violation of any pre-existing duty, and which is the foundation of an exclusively administrative process designed to settle a labor dispute and culminating in a report to Congress. The nonjudicial nature of this function finds its necessary consequence in the determinations which the District Court is called upon to make: (1) The court is required to decide whether a strike "will imperil the national health or safety" if it is not enjoined. While a finding of fact in form, this requires a determination beyond judicial competence, for it requires judgment and understanding wholly beyond the professional capacity of a judge. He is either required to echo uncritically the opinions of the executive officers whose affidavits are produced by the Government (as the court did here) or to inject himself into an area in which there are no judicial guides for decision. In addition, it necessarily involves a prophecy as to the probable outcome of negotiations if an injunction fails to issue, a judgment wholly unlike those normally required of a judge. (2) In exercising his discretion as to whether or not to

issue an injunction, or on what terms, the District Court acts as an economist, for any genuine exercise of discretion requires economic evaluation and prognosis. Indeed, since men cannot be required to return to work without some determination of the terms of their employment, the District Court to a substantial degree is involved, as the court here already is (R. 236, 237, 250), in prescribing wages, hours, and working conditions and settling the collective bargaining contentions of the parties. (3) The final anomaly is inherent in any proceeding which is both designed to deal with "emergencies" and to terminate in 80 days. Congress has attempted to use the ordinary forms of judicial procedure to deal with the kind of accelerated and temporary proceeding for which they are not suited. Ordinary judicial procedures simply cannot cope, and remain judicial, with the problems of proof and review presented when an injunction is used, not as a judicial remedy to correct wrongs or preserve rights, but as an integral but temporary part of an administrative process designed to settle a labor dispute.

The decision below does not meet the issues. It first states that continuance of a strike, when it reaches the stage of peril to national health or safety, is a tort which the Government rectifies as *parens patriae* (R. 290-294). This is plainly erroneous. If it were truly a tort, a union would have an obligation to refrain from striking without awaiting the imposition of a sanction; the sanction would simply vindicate the default in the performance of a pre-existing duty. Yet, under this statute, a union has no duty before the injunction issues to discontinue the strike and Congress intended to create none; the union commits no wrong when it continues a strike, regardless of its impact on national health and safety, if the injunctive procedures of Section 208 are not invoked; and the union is free, and intended to be free, to strike when the 80-day period of the injunction expires.

The decision below next states that the injunction prescribed by the statute simply restores, to a limited degree, the labor injunction as it existed before the Norris-LaGuardia Act, and the labor injunction was historically a "status" judgment (R. 294-295). This too is wrong. However egregious the labor injunction has been, it always purported to rectify wrongs and violations of pre-existing rights. It enjoined violence, breach of contract, or tortious interference with advantageous relationships. It rested on rights con-

ferred by statute or common law. It did not declare status not existing before the declaration was made.[12]

The decision below finally states that the function of the District Court is no different from judicial enforcement of agency orders like those of the National Labor Relations Board, Securities and Exchange Commission, or Interstate Commerce Commission. (R. 295). But the functions of courts in relation to such agencies is the traditional judicial role of keeping the agency within the bounds of its legal authority and of assuring that it neither confers nor denies statutory rights or privileges by means which depart from the statute. *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 275-77. But the moment the court itself engages in functions like rate making or licensing it exercises administrative or legislative powers denied a constitutional court. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. The function of judicial review of agency action is hardly like that imposed upon a District Court under this statute, which is invested with no authority to review anybody's action, but is required to make the first, and only finding, on the issues which Congress has thrust upon it.

Whether Congress properly can, under the Constitution, put the federal district courts in this kind of a business presents, we believe, a serious question which should be reviewed by this court.

## CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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[12] See Frankfurter and Greene, The Labor Injunction (1930) 89-90.